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No. 76-678

In the Supreme Court of the United States

OCTOBER TERM, 1976

SHELL OIL COMPANY, PETITIONER

v.

ANNE M. DARTT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

ALFRED G. ALBERT,
Acting Solicitor of Labor,
Department of Labor,
Washington, D.C. 20210.

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In our memorandum for the United States as *amicus curiae*, we failed expressly to take into account, in discussing whether the notice-to-sue provision of the ADEA is subject to equitable tolling, this Court's recent decision in *International Union of Electrical, Radio & Machine Workers, AFL-CIO, Local 790* v. *Robbins & Myers, Inc.*, No. 75-1264, decided December 20, 1976. For the reasons briefly stated below, we do not believe that the decision in *Robbins & Myers* lessens the importance of review by this Court of the decision below or requires reversal of that decision.

One of the issues presented in *Robbins & Myers* was whether the limitations period specified in Title VII of the Civil Rights Act of 1964, governing the filing of charges under that statute with the Equal Employment

Opportunity Commission (EEOC),[1] was tolled during the pendency of grievance proceedings provided for in the collective-bargaining agreement.[2] In holding that plaintiff's invocation of the grievance process had not tolled the statutory period for filing a claim with the EEOC, this Court relied upon the fact that the plaintiff "was not [in the grievance proceeding] asserting the * * * statutory claim in a different forum, * * * but was asserting an independent claim based on a *contract* right" (slip op. 8; original emphasis). Thus, unlike the situations presented in *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538,[3] and *Burnett* v. *New York Central R. Co.*, 380 U.S. 424,[4] invocation of the grievance

[1]At the time of the discharge complained of in *Robbins & Myers*, Section 706(d) of the Civil Rights Act of 1964, 78 Stat. 260, 42 U.S.C. 2000e-5(d), provided in pertinent part that "[a] charge under subsection (a) of this section shall be filed within [90] days after the alleged unlawful employment practice occurred." The 1972 amendments to Title VII extended this limitations period from 90 days to 180 days. Equal Employment Opportunity Act of 1972, 86 Stat. 105. At the same time, Section 706(d) was renumbered as Section 706(e), 42 U.S.C. (Supp. V) 2000e-5(e).

[2]The plaintiff in *Robbins & Myers* had filed a charge of racial discrimination with the EEOC 84 days after completion of the grievance steps provided for in the collective-bargaining agreement but 108 days after the date of her discharge (slip op. 2).

[3]This Court held in *American Pipe* that the timely filing of a class action under the federal antitrust laws tolled the applicable statute of limitations during the pendency of a motion opposing certification of a class, and protected the rights of persons ultimately denied participation on a class basis to intervene as named plaintiffs.

[4]The plaintiff in *Burnett* had asserted a claim under the Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U.S.C. 51 *et seq.*, in state court, which had concurrent jurisdiction over such claims with the federal courts. This Court held that such filing tolled the applicable limitations period, even though the state court suit was dismissed because of improper venue and plaintiff thereafter filed a new complaint in the United States District Court.

process did not satisfy the policies underlying the statutory limitations period . As this Court pointed out (slip op. 11 n. 14; original emphasis):

> Adherence to the limitations period assures prompt notification to the employer of a charge of an alleged violation of Title VII * * *. The grievance process assures no such comparable notice. In the instant case, the grievance alleged only an "unfair action." Even if racial discrimination is explicitly discussed, however, the grievance procedure properly involves only *contractual* questions, and would but fortuitously implicate the Title VII standards [citing *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, and *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454].[5]

In the present case, by contrast, respondent filed an administrative complaint under the ADEA within nine days of her discharge (see Pet. 4). Shell was formally notified the same day of respondent's complaint, and conciliation efforts under the ADEA began almost immediately (see Pet. 4-5). The present suit is based upon the same cause of action as the earlier conciliation

[5]In *Johnson* v. *Railway Express Agency, Inc., supra*, this Court held that the timely filing of a charge with the EEOC pursuant to Section 706 of Title VII did not toll the running of the statute of limitations applicable to an action, based upon the same facts, under 42 U.S.C. 1981. In reaching that conclusion, this Court emphasized (421 U.S. at 467; footnote omitted):

> [P]erhaps most importantly, the tolling effect given to the timely prior filings in *American Pipe* and in *Burnett* depended heavily on the fact that those filings involved exactly the same cause of action subsequently asserted. This factor was more than a mere abstract or theoretical consideration because the prior filing in each case necessarily operated to avoid the evil against which the statute of limitations was designed to protect.

efforts, involves the same allegations and must be assessed pursuant to the same statutory standards. Thus, unlike the situation in *Robbins & Myers* and related cases, respondent fulfilled the policies underlying the notice-to-sue provision of the ADEA. We therefore submit that the court of appeals correctly held that respondent is entitled to consideration of the present suit on its merits.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

ALFRED G. ALBERT,
Acting Solicitor of Labor.

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